No. 14091

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PEDRO DIAZ-MONTERO

Appellant

VS.

HERBERT BROWNELL, Attorney General of the United States of America

Appellee

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE

CHARLES P. MORIARTY
United States Attorney

JOHN E. BELCHER
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Office and Post Office Address:
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JURISDICTIONAL STATEMENT

Jurisdiction of the District Court is conferred by Title 28 Section 2241, and upon this court by the provisions of Title 28 Section 2253 U.S.C. only.

STATEMENT

This is an appeal from a judgment of dismissal of an action against the Attorney General of the United States under the Declaratory Judgment Act (28 U.S.C.A. Sec. 2201), praying for declaratory relief by suspending the appellant's deportation or, in the alternative, for an order requiring the appellee Attorney General to suspend deportation or to accord appellant a further hearing on the same. The appellee by answer and a motion to dismiss challenged the complaint on the following grounds:

1. By motion to dismiss, alleging that the court did not have jurisdiction to review an order of deportation in an action for a declatory judgment.

2. By way of the first defense in the answer, that the court did not have jurisdiction over the person of the Attorney General of the United States who resides in Washington, D. C.

3. That the petition failed to state a claim upon which relief could be granted.

Upon the trial the following facts were admitted: That the appellant is 47 years of age, single, a citizen of Mexico who last entered the United States at El Paso, Texas, as an agricultural laborer and was admitted for one year on June 29, 1943. He abandoned

his contract employment four months later (October 1943). A warrant of arrest was issued January 9, 1951, alleging that appellant was deportable in that he failed to depart from the United States in accordance with the terms of his admission. (R7)

A deportation hearing was accorded appellant November 30, 1951 at Seattle, Washington, at which time he was represented by counsel. At that hearing he admitted he was deportable under the Immigration laws but applied for suspension of deportation under the provisions of Section 19(c) (2) of the Immigration Act of 1917, as amended (8 U.S.C. 155(c)) *Evidence was taken with respect to his eligibility for such discretionary relief.* On December 7, 1951 the hearing officer recommended that suspension of deportation be denied and further ordered that appellant be deported from the United States pursuant to law. This decision was appealed to the Commissioner, Immigration and Naturalization Service, Washington, D. C., who on February 21, 1952 concurred in the Hearing Officer's decision and ordered the appellant deported; that on May 1, 1952 the Board of Immigration Appeals, upon review, affirmed the Commissioner's decision as to deportability, found appellant eligible under the statute to be considered for discretionary relief, and granted him the privilege of voluntary

departure but *denied him the privilege of suspension of deportation.* In granting voluntary departure in lieu of deportation, the Board of Immigration Appeals further provided that in the event the appellant did not depart from the United States within sixty days (or by July 1, 1952) the order of deportation would be reinstated and executed; that appellant did not depart within a sixty-day period and thereafter brought this action September 23, 1952, at a time when there *was* an outstanding order of deportation (the order being re-instated) charging that the refusal to grant suspension of deportation by the Attorney General was arbitrary and unfair; that the Attorney General abused his discretion; and that the Attorney General should be directed by the district court to suspend the appellant's deportation or to accord him a fair hearing upon the same. He had such a hearing and suspension was denied. The denial was affirmed by the Commissioner and the Board of Immigration Appeals.

The district court, after argument granted appellee's motion to dismiss, and thereafter entered its formal order (R.13) on the 13th day of August 1953.

Notice of appeal was filed September 21, 1953 (R.13)

APPLICABLE STATUTE

8 U. S. C. 155(c):

> "In the case of any alien . . . who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may (1) permit such alien to depart the United States to any country of his choice at his own expense, in lieu of deportation; or (2) suspend deportation of such alien * * * if he finds * * * that such alien has resided continuously in the United States for seven years or more and is residing in the United States upon the effective date of this Act."

The pertinent provisions of the Code of Federal Regulations authorizing the Board of Immigration Appeals to exercise the statutory discretion of the Attorney General under 8 U. S. C. 155 reads, in part, as follows:

> 8 C. F. R., Part 90 Effective May 24, 1952; Published F. R. 4737, May 24, 1952
>
> "90.2 *Organization.* There shall be in the office of the Attorney General a Board of Immigration Appeals. It shall be under the supervision and direction of the Attorney General and shall be responsible solely to him * * *
>
> "90.3 *Jurisdiction, powers, and finality of decisions.* (a) When the Commissioner, or other officers of the Immigration and Naturalization Service designated by the provisions of this chapter, exercise the power and authority of the Attorney General delegated to them by provisions of this chapter by entering orders in proceedings under the immigration, nationality, or

other laws administered by the Service, such orders shall be final except that appeals shall lie to the Board from the following . . . (2) The Decisions of Hearing Officers in deportation proceedings as provided in parts 151 and 152 of this chapter; . . . (d) in considering and determining such appeals or certifications, the Board shall exercise such discretion and power conferred upon the Attorney General by law as is appropriate and necessary for the disposition of the case subject to any specific limitation prescribed by this chapter. The decision of the Board shall be in writing and shall be final except in those cases reviewed by the Attorney General in accordance with 90.7." *(Provisions of 90.7 not applicable herein.)*

The sole question here is can the relief sought be had under the declaratory judgment act, or is the remedy by habeas corpus?

The District Court held that habeas corpus was the sole remedy.

ARGUMENT

Jurisdiction Over Subject Matter

The District Court did not have jurisdiction to review an order of deportation by way of an action for a declaratory judgment.

Heikkila v. Barber et al., 345 U. S. 1, (March 16, 1953.)

The Supreme Court in that case was called upon to review a decision of a three-judge court in the

Northern District of California, dismissing the complaint of Heikkila who sought to set aside an order of deportation by seeking review of agency action as well as injuctive and declaratory relief. The court held that *a deportation order could only be attacked by habeas corpus* and that *Perkins v. Elg* and *McGrath v. Kristensen*, infra, were not deviations from this rule, further that the rule applied to actions brought under the Declaratory Judgment Act, as in the instant case, as well as to relief sought under the Administrative Procedure Act Mr. Justice Clark speaking for the court said:

> "Heikkila suggests that *Perkins v. Elg*, 1939, 307 U. S. 325, 59 S. Ct. 884, 83 L. Ed. 1320 (declaratory and injunctive relief), and *McGrath v. Kristensen*, 1950, 340 U. S. 162, 71 S. Ct. 224, 95 L. Ed. 173 (declaratory relief), were deviations from this rule. But *neither of those cases involved an outstanding deportation order.* Both Elg and Kristensen litigated erroneous determinations of their status, in one case citizenship, in the other eligibility for citizenship. Elg's right to a judicial hearing on her claim of citizenship had been recognized as early as 1922 in *Ng Fung Ho v. White*, 259 U. S. 276, 42 S. Ct. 492, 66 L. Ed. 938. And Kristensen's ineligibility for naturalization was set up in contesting the Attorney General's refusal to suspend deportation proceedings under the special provisions of Sec. 19(c) of the 1917 Immigration Act, as amended, 8 U. S. C. A. Sec. 115(c). Heikkila's status as an alien is not disputed and the relief he wants is against an outstanding deportation order. He has not brought himself within Elg or Kristensen.

"Appellant's Administrative Procedure Act argument in his strongest one. The reasons which take his case out of Sec. 10 apply *a fortiori* to arguments based on the general equity powers of the federal courts and the Declaratory Judgments Act. 28 U. S. C. Sec. 2201. See *Skelly Oil Co. v. Phillips Petroleum Co.*, 1950, 339 U. S. 667, 671-672, 70 S. Ct. 876, 878, 879, 94 L. Ed. 1194. Because we decide the judgment below must be affirmed on this procedural ground, we do not reach the other questions briefed and argued by the parties.

"The rule which we reaffirm recognizes the legislative power to prescribe applicable procedures for those who would contest deportation orders. Congress may well have thought that habeas corpus, despite its apparent inconvenience to the alien, should be the exclusive remedy in these cases in order to minimise opportunities for repetitious litigation and consequent delays as well as to avoid possible venue difficulties connected with any other type of action. [13]We are advised that the Government has recommended legislation which would permit what Heikkila has tried here. But the choice is not ours."

Like Heikkila, this case does not come within the rule in *McGrath v. Kristensen*, 340 U. S. 162 as in that case construction of a statute was involved to determine if he was eligible for citizenship. There, the Attorney General would not exercise discretionary power because it was found that Kristensen was "ineligible for citizenship" and precluded by statute from consideration. Here the complainant admits that dis-

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[13] See *Paolo v. Garfinkel*, 3 Cir., 200 F. (2d) 280.

cretion was exercised, because appellant was found to be eligible for voluntary departure and such relief was actually granted. The statute, 8 U. S. C. A. 155(c), authorizes the Attorney General to grant voluntary departure or suspension of deportation *in* his his discretion.

Just three days before the Supreme Court decided the Heikkila case, Judge Yankwich of the District Court of California for the southern division on March 13, 1953 in the case of *Corona v. Landon*, 111 F. Supp. 191 at 193, 196 held that *orders of deportation could be reviewed only in habeas corpus proceedings*. Judge Yankwich further pointed out, p. 196, that a petition for review could not be turned into a habeas corpus proceeding where the defendant was not in custody, citing *Medalha v. Shaughnessy*, 102 F. Supp. 950.

Jurisdiction Over The Person

The district court did not have jurisdiction over the person of the Attorney General because of the insufficiency of service of process.

Rule 4(d) (5) and 4(f), Federal Rules of Civil Procedure citing:

Eng Kam v. McGrath, 10 Fed. Rules Decision 135 (D. C. W. D. Washington, 1950)

Burns v. Commissioner, Immigration and Naturalization, 103 F. Supp. 180.

Connor v. Miller, 178 F. (2d) 755.

Paolo v. Garfinkel, 200 F. (2d) 280.

Corona v. Landon, 111 F. Supp. 191.

c. f. *Heikkila v. Barber* quoted p. 4, line 30 where the Supreme Court refers to the venue difficulties in this type of action citing *Paolo v. Garfinkel* (supra).

The certified return of service in this action shows that the defendant Attorney General was served by registered mail on September 23, 1952 by mailing two copies of the summons and petition.

FAILURE TO STATE A CLAIM FOR WHICH RELIEF MAY BE GRANTED

The petition fails to state a claim upon which relief can be granted.

The petition herein, (R.3) on its face, shows that the appellant was granted voluntary departure, a form of discretionary relief provided under 8 U. S. C. 155(c), therefore, no question can be raised as to an *arbitrary denial of discretionary relief* under the statute. Judicial review of the Attorney General's statutory power to allow voluntary departure or suspension of deportation is narrowly restricted.

Weedeke v. Watkins, 166 F. (2d) 369.

Judge Learned Hand in *Kaloudis v. Shaughnessy*, 180 F. (2d) 489, January 30, 1950, described the discretionary power of the Attorney General as follows:

> "The power of the Attorney General to suspend deportation is a dispensing power, like a judge's power to suspend the execution of a sentence, or the President's to pardon a convict. It is a matter of grace, over which the courts have no review unless—as we are assuming—it affirmatively appears that the denial has been actuated by considerations that Congress could not have intended to make relevant. It is by no means true that 'due process of law' inevitably involves an eventual resort to courts, no matter what may be the subject at stake; not every governmental action is subject to review by judges."

This case does not present the situation where there has been refusal to exercise discretionary relief. The only complaint here is that the Board refused to exercise discretion in a certain manner, by suspending deportation. No facts are set out in the complaint which affirmatively allege a refusal to exercise discretion or a clear abuse of discretion. True, appellant alleges that the action taken by the Attorney General was arbitrary but here what the appellant claims is an arbitrary exercise of discretion was actually a decision in the appellant's favor in *allowing him to depart from the United States without having the stigma of deportation upon his record*, thus preventing his return to the United States. How can it be

said that a privilege granted to an alien who has no right to remain in the United States whatsoever can be arbitrary? The statute clearly gives the Attorney General discretion to grant voluntary departure or, in his discretion, to grant suspension of deportation. "The Attorney General may (1) permit such alien to depart from the United States to any country of his choice at his own expense, in lieu of deportation; or (2) suspend deportation of such alien."

No judicial authority has been found where a court has held the action of the Attorney General to be arbitrary when relief from deportation has been accorded the alien. The order providing a time limit within which departure must be accomplished has been upheld by the Second Circuit in

> *United States ex rel Bartsch v. Watkins*, 175 F. (2d) 245.

There the alien contended that the Board of Immigration Appeals erred in denying his motion for an extension of the ninety-day period granted him for voluntary departure and the court stated:

> "Whether or not a deportable alien shall be granted the privilege of voluntary departure lies in the discretion of the Immigration authorities. 8 U. S. C. 155(c). Since they need not grant it at all, they may grant it on condition that it be exercised within a specified time. If they will not extend the time, the courts cannot intervene.

United States v. Reimer, (2d) Cir., 103 F. (2d) 777, 779. c. f. *United States v. Watkins*, (2d) Cir., 167 F. (2d) 279, 282."

The appellant alleges, paragraph VI, page 2 of the complaint, (R.5) that by reason of the fact that the Board found the petitioner to be of good moral character and that he had resided in the United States for seven years, it acted arbitrarily in granting voluntary departure instead of suspension of deportation. This is the only allegation found in the petition as a basis for arbitrary action by the Attorney General. This argument was rejected by the court in

Adell v. Shaughnessy, 183 F. (2d) 371.

"We think that, in the amended section, the good moral character for the preceding five years is a necessary but not a sufficient condition of the granting of relief."

and then the court commented in footnote 5, "Consumption of salt is a necessary condition to a man's survival, but the consumption of salt will not alone suffice as a condition to that survival."

There is nothing in the complaint which would indicate that the Board did not take into consideration other factors in the appellant's record in arriving at its decision.

It is respectfully submitted that the judgment of the district court is correct and should be affirmed.

ANSWER TO APPELLANT'S BRIEF

Counsel in his analysis of the case of *Heikkila v. Barber*, 345 U. S. 1, seeks to distinguish the instant case from that on the basis of an order of deportation *then in force;* and that Heikkila *had made no application for suspension of deportation.*

Here, the decision of the Attorney General did nothing more than temporarily suspend the order of deportation for the period of sixty days on condition that the alien voluntarily depart. When that condition was not met the deportation order was reinstated and was, when this action was commenced on September 23, 1952, *then in force.*

The granting or denying suspension of deportation is *wholly discretionary* on the part of the Attorney General.

Alexiou v. McGrath, (D.C.D.C. 1951) 101 F. Supp. 421.

The rules and regulations of the United States Attorney General providing that a person subject to deportation may apply for discretionary relief in the nature of a voluntary departure, suspension of deportation or pre-examination as to right of re-entry, have the force and effect of law.

Mastrapasqua v. Shaughnessy, (C. A. N. Y. 1950) 180 F. (2d) 999.

Exercise by Board of Immigration Appeals of its discretionary power under this Section (Sec. 155) to suspend deportation is not reviewable by courts, unless there has been a clear abuse of discretion or a clear failure to exercise discretion, and in such case, court can only require that the discretion be exercised.

U. S. ex rel. Adel v. Shaughnessy, 183 F. (2d) 371.

The power of the Attorney General to suspend deportation is a dispensing power like a judge's power to suspend execution of a sentence or the President's to pardon a convict; and it is a matter of grace over which the courts have no review under requirement of due process of law, unless denial has been actuated by considerations that Congress could not have intended to make relevant.

U. S. ex rel. Kaloudis v. Shaughnessy, 180 F. (2d) 489.

At the time this action was commenced appellant had an outstanding deportation warrant against him, because he had not availed himself of the privilege of voluntary departure within the sixty day period allowed which automatically re-instated the deportation order.

It is argued that the case of *McGrath v. Kristensen*, 340 U. S. 162 is controling here.

We have set out in our argument to sustain the judgment herein Mr. Justice Clark's remarks about both the cases of *Perkins v. Elg*, 307 U. S. 325 and *McGrath v. Kristensen*, 340 U. S. 162 in the Heikkila case, supra where it was said:

> "And Kristensen's ineligibility for naturalization was set up in contesting the Attorney General's refusal to suspend deportation proceedings under special provisions of Sec. 19(c) of the 1917 Immigration Act. as amended 8 U.S.C.A. Sec. 115(c). Heikkila's status as an alien is not disputed and the relief he wants is against an outstanding deportation order."

Here, appellant's status as an alien is admitted, and the relief *he* wants is against an outstanding deportation order.

CONCLUSION

It is respectfully submitted that the decision of the district court is in all things correct and should be affirmed.

Respectfully submitted,

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